

ECtHR: ERIK ADAMČO v. SLOVAKIA (Application no. 19990/20, 1 June 2023): The Proportionality Factor in the Question of the Use of the Testimony of a Cooperating Accused with an Impact on the Overall Fairness of the Criminal Proceedings / Stanislav Mihálik, Lukáš Turay

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Abstract: *The main task of the presented commentary is primarily the analysis of the decision of the European Court of Human Rights (ECtHR) in the case of Erik Adamčo v. Slovakia (Application no. 19990/20) dated June 1, 2023. This analysis specifically considers the implications for legal practice in the conditions of the Slovak Republic. The legal framework focuses on cooperating individuals and their testimonies during criminal proceedings, particularly considering the necessity of perceiving the proportionality of using such evidence in relation to guarantees securing the overall fairness of the proceedings. Examining this question is particularly significant in cases involving statements of individuals who admitted to committing criminal activities in the initial stages of criminal proceedings and subsequently agreed to cooperate with the prosecution in order to obtain certain benefits. The inherent issue in this regard is not merely the use of this type of evidence but rather the manner in which it is utilised, emphasising the perception of the benefits associated with its provision.*

Key words: *Collaborating Witnesses; Eyewitness Testimony as the only Evidence; Right to a Fair Trial; Overall Fairness of the Proceedings; ECtHR*

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1. INTRODUCTION OR HOW TO VIEW PENITENTS IN THE SLOVAK REPUBLIC

The institute of the Cooperating Accused became part of the Criminal Code No. 301/2005 Coll. (hereinafter referred to as the Criminal Code or TP) through the recodification in 2005. In professional literature, we can encounter various terms simplifying the name of a cooperating accused, such as "crown witness" or "penitent." We

believe that these terms may not necessarily be synonymous. Kandalcová (2017, p. 75) states that the term "crown witness" is derived from the concept of a "crown witness," in the context of which it refers to a witness who provides crucial testimony in favour of the prosecution (in the current reality of the prosecution). Considering "crown witness" as a synonym for the term "cooperating accused" is, in our opinion, incorrect. A "crown witness" can also be a person who directly witnessed an act with their own senses and may not necessarily be accused of participating in criminal activity. In layman's terms, the term "penitent" is most commonly mentioned. Some courts have even adopted this terminology in their decisions.¹ In our opinion, the terms "penitent" and "cooperating accused" should not be interchangeable. We agree with the views of Vrtíková and Mokrá, who suggest that the current legal status of a cooperating accused provides a relatively strong motivation for such individuals to lie, solely to obtain the benefits presumed by law, which may ultimately lead to impunity in criminal proceedings (Vrtíková and Mokrá, 2023, p. 18). Therefore, a penitent individual may dishonestly contribute to the discovery of criminal activity to avoid personal punishment.

The legal regulation of a cooperating accused is primarily governed by § 218 of the Criminal Code. This provision allows² the prosecutor to suspend criminal prosecution after meeting three cumulative conditions: a) The accused significantly contributed to the investigation of corruption, the crime of establishing, conspiring, or supporting a criminal group, or a crime committed by an organised criminal group or a criminal group, or terrorist crimes, or to the identification or conviction of the perpetrator of this crime; b) society's interest in clarifying such a crime exceeds the interest in prosecuting the accused for such a crime or another crime; c) conditional suspension of criminal prosecution may not apply to the organiser, instigator, or orderer of the crime whose clarification the accused contributed to (Čentéš et al., 2021, p. 226).

From the above legal regulation, it can be deduced that this institute has a relatively narrow scope, as it is limited on one hand by the person of the perpetrator and the legal qualification of the act constituting the crime in which they were involved. The first limiting factor is the fact that this institute can only be applied in the case of serious crimes, the proof of which is often complicated (Štrkolec, 2022, p. 132). In the case of corruption, in particular, proving such a crime is very complicated because both parties involved (the briber and the bribed) often benefit from corrupt behaviour. Their interest in revealing such wrongful conduct is often minimal. However, the application of this institute is even more problematic in the case of criminal groups or groups of people engaged in criminal activities. Currently, § 129 of the Criminal Code contains definitions of terms such as a group of persons (paragraph 1), an organised group (paragraph 2), an extremist group (paragraph 3), a criminal group (paragraph 4), and a terrorist group (paragraph 5), as well as activities and support for criminal and terrorist groups (paragraphs 6 and 7). An organised group according to § 129 paragraph 2 of the Criminal Code, an extremist group according to § 129 paragraph 3 of the Criminal Code, a criminal group according to § 129 paragraph 4 of the Criminal Code, and a terrorist group according to § 129 paragraph 5 of the Criminal Code are special forms of a group of persons that are associations for the purpose of committing criminal activities and are characterised by a certain level of organisation (Vojtuš, 2020, p. 135). For the purposes of this issue, we will focus on an organised and a criminal group only. The Criminal Code recognises two basic forms of organised crime. An organised group, as defined in § 129

¹ For example, Resolution of the Supreme Court of the Slovak Republic 1Tdo/27/2023, Resolution of the Constitutional Court of the Slovak Republic IV. ÚS 10/2022, etc.

² In this context, we must point out that it is an option for the prosecutor, not an obligation.

paragraph 2 of the Criminal Code, is an association of at least three persons for the purpose of committing a criminal offense, with a certain division of designated tasks among individual members of the group, whose activities are characterised by planning and coordination, increasing the likelihood of successfully committing a criminal offense. The second form of organised crime is the so-called criminal group, which is defined in § 129 paragraph 4 of the Criminal Code as a structured group of at least three persons that exists for a certain period of time and acts in a coordinated manner with the aim of committing one or more crimes, the crime of money laundering according to § 233 or some of the corruption crimes according to the eighth chapter of the third part of the special section for the purpose of direct or indirect financial gain. In practice, the distinction between a criminal group and an organised group is often highly contentious. In recent times, we have witnessed a relaxation of the definitional characteristics of a criminal group in comparison to those of an organised group.³ In practical application, there are situations where the specialised prosecution authorities cannot definitively determine whether it is an organised group or a criminal group, which directly impacts the possibility of applying the institute of a cooperating accused. For the correct application of the conditional suspension of criminal prosecution of a cooperating accused, it is essential to preserve the right of defence for individuals against whom the cooperating accused testifies. During the preparatory proceedings, it is at least necessary for the defence attorney of the accused who is not cooperating to be present during the questioning of the cooperating accused. The decision on whether the accused can participate in such an act and ask questions to the person being questioned should be made by the police officer. This is especially the case when the accused does not have a defence attorney, and the act consists of questioning a witness, where there is a reasonable expectation that it will not be possible to conduct it in court proceedings (Čopko and Romža, 2018, p.149).

2. FACTS OF THE CASE ERIK ADAMČO (MAIN CIRCUMSTANCES)

The foundational framework of the submission to the European Court of Human Rights (hereinafter "the Court" or "ECtHR") can be considered a reference to the alleged unfairness in the criminal proceedings against Erik Adamčo (hereinafter also referred to as "the applicant"), with regard to Article 6 §§ 1 and 3 (d) of the European Convention on Human Rights (hereinafter referred to as "the Convention").⁴ He was convicted in two cases of murder committed in the form of complicity (related to organised crime). The alleged unfairness was said to rest in the fact that, in proving the applicant's guilt, the testimonies of accomplices in criminal activity who cooperated with the prosecution, in connection with promises of immunity or other benefits, played a significant role as evidence. The objection was not to the use of this type of evidence itself (or the use of such evidence in the evidentiary process in general), but the applicant's arguments focused on the manner of their use, considering their inconsistency (especially in relation to one of the testimonies). In the submission, E. Adamčo also pointed out the insufficient justification and arbitrariness of the decisions in question.

From the perspective of the argumentation, the focus was primarily on three testimonies (individuals B, C, E). In chronological terms, the first testimony was that of individual E (at that time in custody for another unrelated murder), who, in October 2012,

³ Resolution of the Supreme Court Case No. 5To 9/2013.

⁴ In the case of Article 6 §§ 1 of the Convention, the relevant part is: "*In the determination ...of any criminal charge against him, everyone is entitled to a fair ...hearing ...by [a] ...tribunal...*".

confessed to murdering person D (with the testimony also incriminating the applicant).⁵ In March 2016, the motion to reopen the case (retrial) was denied, citing inconsistencies in the testimony of individual E (compared to the evidence obtained in the original trial). The decision of the district court was subsequently affirmed in the appellate proceedings. The second testimony is from individual B (from March 2014), who was serving a sentence for several other murders at that time. This person admitted to ordering the arrival of person A with the intention of murdering them, and the applicant was supposed to be among those who brought them.⁶ Finally, the testimony of individual C is also relevant (who was also among those supposed to bring person A to person B), and in this context, they testified about the involvement of the applicant in the aforementioned criminal activity (the murder of person A).⁷

The prosecution in the case of the applicant was primarily based on the testimonies of individuals B, C, and E. However, during the proceedings at the first instance, these individuals were heard as witnesses not only for the purpose of maintaining adversarial proceedings but also other witnesses were called, and various types of evidence were repeatedly presented. Considering additional facts in this particular case, it is relevant to mention the extensive forensic examination, especially concerning the causes of death of individuals A and D, the mechanism of their occurrence, and the psychological profiles of the accused. In the course of the defence arguments, the applicant primarily pointed out fundamental inconsistencies in the testimonies of individuals B, C, and E (regarding contradictions in their statements, the number of individuals involved in criminal activities, and practical mutual discrepancies in relation to selected facts; perhaps the most significant discrepancy in terms of their testimonies was the statement of individual E on how he was supposed to shoot person D, as it was entirely inconsistent with the expert's findings). Despite the arguments presented by the applicant, he was found guilty of both murders, and a 25-year prison sentence was imposed on him. In terms of the evidentiary situation, the testimonies of individuals B, C, and E were of primary importance, supplemented by the statements of other witnesses (who, however, had acquired information indirectly, from the perpetrators themselves).

However, in terms of the presented text, what is crucial in connection with cooperating witnesses (based on the applicant's objection) is the argumentation of the district court that the testimonies of individuals testifying in favour of the prosecution (in relation to the promise of relevant benefits) were approached "particularly carefully" and "particularly attentively", observing their internal logic and connections with other evidence. The identified ambiguities, especially in connotations with evidence of a more objective nature, did not, however, undermine the credibility of individual testimonies of cooperating witnesses. The assessment of the benefits provided itself was not the subject of its own argumentation; however, the court noted that the process of providing benefits itself was assumed by legislation and, therefore, legally approved (with the addition that the witnesses ultimately not only described the actions of the objector but

⁵ Criminal proceedings against person E were suspended (even in connection with two other murders), precisely due to significant contributions to the investigation of organised crime. However, the Court did not have information about how the criminal proceedings against this person continued in these cases.

⁶ In the case of person B, the court established that he was accused of complicity in relation to person A, with the decision that criminal proceedings would take place in a separate proceeding (without any further information about the course of the proceedings).

⁷ Regarding person C, the indictment was temporarily suspended in 2014 (as the person significantly contributed to the investigation of organised crime through their actions). It was demonstrated that charges were brought against this person in 2022 (referring to the so-called pre-trial proceedings). However, the court did not have additional information.

practically incriminated themselves as well). From a reasoning perspective, it was further stated that inconsistency in testimonies and the existence of discrepancies are rather expected phenomena, especially assuming that prearranged testimonies or testimonies given under pressure would exhibit signs of agreement and consistency. Therefore, it was ultimately established by the court that the argument within which the testimonies would be false lacks logic.

Within the appeal proceedings, the applicant persisted in his argumentation and further supported it by emphasising the inadmissibility of the testimonies of individuals B, C, and E as witnesses, as they were, in fact, perpetrators. The applicant pointed out primarily the fact that, given their access to the case file (in the position of perpetrators), these individuals could tailor their testimonies to meet the prosecution's requirements. In addition to challenging the admissibility of such evidence per se, the applicant also raised procedural considerations of admissibility by assessing the proportionality of such evidence in terms of the benefits provided to these individuals (and their appropriateness). The applicant also highlighted other cases in which they themselves acted as perpetrators, and cooperating perpetrators similarly went unpunished. He added that the provided benefits were not only disproportionate (practically at the level of immunity) but were also practically exempt from judicial control (as they were in the hands of the prosecution). Specifically, they pointed to individual B, for whom the benefit granted was the commutation of a life sentence.

In this case, the appeal was rejected, with the court primarily noting that the applicant's argumentation focused on challenging the reasoning of the decision or the process of evaluating evidence. However, it is important to highlight a passage from the reasoning of the appellate court, which pointed out that the use of testimonies from cooperating witnesses is a relevant element in criminal proceedings. Still, it can be considered relatively controversial to add that such evidence practically does not need to be supported by other types of evidence (because the control of this type of evidence should be the starting point). Furthermore, the appellate court stated that in this particular case, the testimonies of cooperating witnesses were supplemented (and confronted) with a series of other pieces of evidence (in accordance with the principle of free evaluation of evidence, as one of the fundamental principles of proving, as envisaged by the Code of Criminal Procedure in the conditions of the Slovak Republic).

In the appeal on points of law, the applicant built his argumentation on the previously submitted proposals but added that, in cases of complicity, the testimonies of co-accused (especially concerning cooperating individuals) need to be supported to strengthen the overall evidentiary situation. However, they stated that, in this case, the testimonies of cooperating accused were used in a way that made other related pieces of evidence procedurally sustainable. The Supreme Court of the Slovak Republic, acting as the appellate court, deemed the appeal on points of law inadmissible, citing the nature of the examination that comes into consideration within the appeal.

The applicant subsequently turned to the Constitutional Court of the Slovak Republic through a constitutional complaint, highlighting, in light of the arguments presented, primarily an infringement on the right to a fair trial. On December 17, 2019, the Constitutional Court of the Slovak Republic declared the specific complaint as inadmissible, emphasising particularly the sustainability of the conclusions of the lower courts with respect to constitutional guarantees. It was specifically pointed out that individual types of evidence (including the contested testimonies) were evaluated in the context of the entirety of the evidence. At the same time, it was stated that the conclusion that the courts did not address or deal with the benefits provided to cooperating individuals (in the procedural position of witnesses) could not be drawn.

3. ECtHR CASE ASSESSMENT

The Court evaluated the applicant's request as admissible and considered the merits of the case. In terms of general principles, the Court noted that the right to a fair trial under Article 6 of the Convention does not contain rules regarding the admissibility of a certain type of evidence *per se*, as it is within the discretion of each state.⁸ In this case, the Court emphasised the need for a strict distinction between the admissibility of evidence and the right to a defence in relation to specific evidence presented in criminal proceedings. This reflects the role of evidence, which is not only to assess the first of the questions but to determine whether the course of proceedings (as a whole), including the possible exercise of the right to defence, or the method of obtaining evidence, can be perceived as fair. In connection with the specific case, it is appropriate to mention that there is an undisputed proportionality between the strength and reliability of certain evidence in relation to the need for other types of evidence. Although this is not inherently unfair to the criminal proceedings as such, it can be stated that the greater the reliability of the evidence, the proportionally lower the need for corroborative evidence.⁹ In such cases, the principle of *in dubio pro reo* (any doubt should benefit the accused) ultimately applies. The Court also confirmed that the use of inculpatory testimony from an accomplice in the crime (usually in the position of a cooperating witness) is permissible, even when it concerns a person acting in the field of organised crime.¹⁰ However, it added that the use of this type of evidence may practically challenge the overall fairness of the proceedings, especially considering the argument that such testimonies may be motivated by seeking an advantage, immunity, or revenge.

In the context of applying general principles to the factual circumstances of the case, the Court first noted that according to the words of the Government of the Slovak Republic itself, the conviction of the perpetrator was not based solely on the testimonies of witnesses B, C, and E (although these testimonies, construed and confirmed the potential connection of the applicant to the murders, were designated as key testimonies, with reference to the testimonies of other witnesses and the factual conclusions of experts). In connection, the Court pointed out that, for example, the experts did not address the question of the person who caused the death, but rather focused on the mechanism and causes of death. Therefore, with regard to the significance of the testimonies of cooperating witnesses for the criminal responsibility of the applicant, these had unquestionable procedural weight.

The subject of the Court's examination should primarily be the assertion of the applicant's objections concerning the relevant evidence in the context of domestic proceedings,¹¹ considering the correlation when the framework of the control itself (and its intensity) must be directly proportional to the benefits provided to cooperating individuals.¹² Regarding the handling of this matter at the national court level, the Court noted that the district court described the examination process of the relevant evidence as "particularly careful" and "especially attentive", dealing with the internal logic of these pieces of evidence in relation to the overall evidentiary situation. It also highlighted the

⁸ As is also evident from: ECtHR, *Schenk v. Switzerland*, app. no. 10862/84, 12 July 1988; ECtHR, *Jalloh v. Germany* [GC], app. no. 54810/00, 11 July 2006; and ECtHR, *Moreira Ferreira v. Portugal* (no. 2) [GC], app. no. 19867/12, 11 July 2017.

⁹ See ECtHR, *Lee Davies, v. Belgium*, app. no. 18704/05, 28 July 2009 and ECtHR, *Bašić v. Croatia*, app. no. 22251/13, 25 October 2016.

¹⁰ See ECtHR, *Xenofontos and Others v. Cyprus*, app. nos. 68725/16, 74339/16 and 74359/16, 25 October 2022.

¹¹ For that, see ECtHR, *Adamčo v. Slovakia*, app. no. 45084/14, 12 November 2019.

¹² See ECtHR, *Erdem v. Germany* (dec.), app. no. 38321/97, 09 December 1999.

approach and findings of the Constitutional Court of the Slovak Republic, stating that the testimonies, as evidence, were not evaluated like any other evidence, given their nature. Specifically, their assessment did not take into account the advantages belonging to cooperating witnesses. However, the Court found the wording of this statement unconvincing, particularly for its practical unsustainability, where the appellate court and appellate court on points of law referred to the principle of free evaluation of evidence and considering such evidence like any other. Here, too, the Court established that the naming of the approach (whether it involves applying a principle or a tool of domestic law) is not crucial; rather, it is the approach itself and its result, especially concerning the objection raised by the applicant. In the final analysis, the Court concluded that despite the courts acknowledging that due attention was given to the extent and impact of the benefits, especially concerning the testimonies of individuals B and C, it was narrowed down only to expressing the thesis that the provision of benefits was in accordance with the legal regulations. The testimony of individual E was assessed by the Court as full of inconsistencies, where the evidentiary situation practically aimed to confirm the version of events presented by E. The testimony itself, in the context of other evidence, should have been subject to critical scrutiny.

In the context stated, the Court noted that the manner in which the courts responded to the applicant's objections apparently distorts the essence of the relevant evidence, lacking internal coherence in its justifications. It pointed out, for example, a difference to the *Xenofontos and Others* case, specifically regarding the absence of impartiality in the conduct of cooperating witnesses (conversely, the exclusion of impartiality in the conduct of these individuals was absent). As a result, the Court concluded that the courts at the level of the Slovak Republic did not genuinely pay any relevant attention to the extent of the benefits obtained by cooperating witnesses (or, at most, there were only hints of such investigation, with the court highlighting the complainant's properly raised objections concerning the factual circumstances of the case, which unquestionably challenged the described approach). This occurred despite the applicant's objections being raised, or the possibility of a contradictory hearing of the relevant witnesses (with the responses to the objections being only abstract answers from the courts). „*The simple principle of contradiction is in our criminal proceedings in a modified form, because its application in absolute form... in which the judge acts as an independent arbitrator guiding the process of proving... is unrealistic*“ (Romža, 2018, p. 36).

The Court pointed out the considerable extent and significance of the benefits (as described in the text above). It considered this in the context that prejudicial proceedings, in this element (with regard to accessing the cooperating witness), can be described as a lack of judicial control. The overall fairness of the proceedings was therefore disrupted, precisely in terms of the importance of the testimonies of cooperating witnesses, particularly concerning their use (and the practically absent weighing of the provided benefits in relation to their significance in establishing the complainant's guilt). Due to the lack of these guarantees of justice, a violation of Article 6 of the Convention was declared in this case.

4. MEANING AND IMPLICATIONS OF THE DECISION FOR THE PURPOSES OF APPLICATION PRACTICE IN THE SLOVAK REPUBLIC

However, how to comprehensively assess the impacts of the decision on the practical application in the environment of the Slovak Republic? Firstly, it is important to note that the Court's decision did not call into question the institution of the cooperating accused as such (or, more broadly, cooperating individuals), as it represents a standard

institution within the legal frameworks of states. Rather, the scrutiny was directed at the manner in which it is utilised, which has already raised concerns in several cases before the Court.

Based on the examination of available cases, the problem primarily arises from the combination of two fundamental assumptions (excluding the existence of the testimony of the cooperating accused as an assumption in itself). The first assumption is that such testimony constitutes the main inculpatory evidence, which is usually supplemented by a framework of indirect evidence. It often happens that even though such testimony should be the beginning of the evidentiary process, creating a logical, internally consistent, and sustainable framework for the decision itself, it is perceived as a kind of conclusion of the evidentiary process in the form of universal proof. Testing such testimony within the framework of other evidence allows for establishing its truthfulness and, ultimately, its procedural usability. It is undisputed that even in this case, the principle of free evaluation of evidence must guide the process of proving. However, as evidenced by the Court's decision-making activities, such testimony must be perceived with particular care, not only in isolation (as evidence per se) but primarily in the context of the overall evidentiary situation.

The second assumption concerns the extent to which the benefits provided to such cooperating individuals are taken into account. The Court itself expressed a certain degree of concern in the analysed case that, despite the declared status, some cases of provided benefits become, in practice, a form of immunity for the person (moreover, fully under the control of law enforcement authorities, without the possibility of judicial review). It is then essential not only to be aware of the framework of benefits but also, using a modified proportionality test, to weigh them in relation to the significance of such testimony for the criminal process. Failure to meet this requirement can become a reason for the absence of guarantees in ensuring the justice of the criminal process as a whole. In the conditions of the Slovak Republic, several fundamental principles apply in criminal proceedings, with the principle of promptness and fairness being applicable even during the preparatory proceedings: "...the competent procedural bodies ...must be guided by the principle of speed and fairness of criminal proceedings" (Romža, 2018, p. 89).

As for the response to the situations highlighted by the Court, it is understandable that their resolution does not lie in a change in legislation, i.e., objective law. It is appropriate to state that, from the perspective of the procedural line of the institution of the cooperating accused (or cooperating individual), this can be considered constant in the conditions of the Slovak Republic, especially in connection with the recodification of criminal law effective since January 1, 2006. It is even necessary to mention that "...the possibility of obtaining a better position for a person exists [at the stage] before bringing charges." (Vrtíková and Mokra, 2023, p. 41). In a comprehensive sense, it involves a set of tools that act attractively in connection with active cooperation in clarifying criminal activities. At the pre-indictment stage, one such tool is the temporary suspension of the filing of charges; after filing charges, this can include facultative termination of the criminal prosecution of the cooperating accused, conditional termination of the criminal prosecution of the cooperating accused, suspension of the criminal prosecution of the cooperating accused, and ultimately, the guilty plea agreement. At this point, it is necessary to add that, effective from November 1, 2011, it was explicitly stipulated that "...a person who significantly contributed to clarifying said criminal offenses may temporarily defer the filing of charges for such a crime or for any other crime..." (Vrtíková and Mokra, 2023, p. 41), with regard to influencing the motivation of individuals to participate in investigating criminal activities.

However, as mentioned above, and also highlighted by the Court, the problem in this case lies in the application practice. Not only has this been demonstrated in several cases examined by the Court,¹³ but the General Prosecutor's Office of the Slovak Republic (as the highest state authority within the system of entities comprising the Public Prosecutor's Office of the Slovak Republic; hereinafter referred to as the "General Prosecutor's Office") has responded to this situation through its standpoint. In 2019, it pointed out that it is aware of the situation, and although the institution of the cooperating accused (the standpoint uses the term "crown witness") itself is not in conflict with the Convention, an application problem arises when such testimony is the only direct incriminating evidence. They emphasised, above all, the absolute impunity associated with such situations. In its standpoint, the General Prosecutor's Office also stated that it would consider initiating legislative measures concerning the relevant institution. Despite this statement, no such initiative has been taken to this day (Pirošiková, 2023).¹⁴ As evident from the text, the General Prosecutor's Office identified situations that it perceives as problematic in terms of their impact on the overall justice of criminal proceedings, similar to the concerns expressed by the Court. Thus, it is not the application of the institution itself, but rather the situation where benefits are not provided in proportion to the significance of the witness's testimony. In such a situation, these benefits can be seen as disproportionate.

In terms of the utmost topicality of the processed issue, it is appropriate to highlight a legislative initiative by the Ministry of Justice of the Slovak Republic, which was approved by the Government of the Slovak Republic at the time of finalising this commentary. It is necessary to note that this is a relatively comprehensive amendment to the Criminal Code, which substantially touches upon the Code of Criminal Procedure, specifically the concept of cooperating persons. Since its inception, the Government of the Slovak Republic has pointed out the problem of a kind of "abuse" of the institution of cooperating individuals or the lack of sufficient control regarding the use and provision of benefits in pre-trial proceedings. The proposal touches upon the focal point of this institution in several significant aspects. The first is the theoretical-methodological aspect, as it proposes the legislative establishment of the concept of a "cooperating person," which would substantively encompass both a cooperating accused and a cooperating suspect (i.e., at the pre-trial stage). Such a person is someone accused or suspected of committing a criminal offense who significantly participates or is expected to participate in elucidating certain criminal offenses listed in the relevant provisions of the Criminal Procedure Code or the Criminal Code, or who contributes to the identification or conviction of their perpetrators. Similarly, the definition of the term "benefit of a cooperating person," i.e., a benefit provided for by the Criminal Procedure Code or the Criminal Code in their respective provisions, or any other benefit related to procedural actions, other proceedings, or the omission of authorities or persons to act under this law, which was provided, facilitated, otherwise secured, proposed, or formally or informally promised to a cooperating person by a court or an authority active in criminal proceedings in exchange for their participation in elucidating criminal offenses, identification, or conviction of their perpetrators, is also expected. The definition of these terms is related

¹³ ECtHR, *Adamčo v. Slovakia*, app. no. 45084/14, 12 November 2019; ECtHR, *Vasaráb a Paulus v. Slovakia*, app. nos. 28081/19 and 29664/19, 25 and 29 May 2019, etc.

¹⁴ Likewise in Proposal of the law amending and supplementing Act No. 300/2005 Coll. Criminal Code as amended by later regulations, and amending and supplementing certain laws. Available at: <https://rokovania.gov.sk/RVL/Material/29089/1> (accessed on 07.12.2023).

to the interest in eliminating theoretical vagueness associated with the mechanism of cooperating individuals, as these are commonly used terms.¹⁵

The proposed provision of the Code of Criminal Procedure is of particular importance, as it not only legislatively establishes and specifies the conditions for the cooperation of individuals with law enforcement authorities, but primarily delimits the concept of legality review of such cooperation (within the ongoing criminal prosecution). Therefore, it requires proper documentation of the cooperation itself and, last but not least, its disclosure, no later than in proceedings before the court, if the examination of such a person is required (or reading the testimony of such a person following the appropriate procedural steps), to whom benefits were promised or provided. The scope and content of benefits provided to cooperating individuals are, according to the proposed regulation, a circumstance necessary to determine and verify the impartiality and credibility of a witness. Investigative files would, in this regard, include not only records of the cooperation of such individuals in the specific case but also in other criminal cases (the right to study such a file may be restricted by the prosecutor only in cases of exceptionally serious reasons). This is associated with the proposed intertemporal provision defining the procedure regarding ongoing criminal prosecutions (as of the effective date of the amendment to the Criminal Procedure Code).¹⁶

One of the most significant changes proposed in the amendment to the Criminal Procedure Code, regarding cooperating individuals, includes the introduction of a deadline for temporary suspension of the indictment (with the possibility of extension) and the establishment of a judicial element of control concerning the termination of the criminal prosecution of a cooperating accused and the conditional termination of the criminal prosecution of a cooperating accused. According to the proposed legal framework, the prosecutor would only have the authority to propose such a procedure, and the judge for preparatory proceedings would make the decision after reviewing the case file and hearing the accused, or other individuals involved (which, incidentally, allows for an appellate review or appellate on points of law review of such decisions). The proposer emphasises in the explanatory memorandum to the bill that this constitutes a significant element in the process of setting up so-called "repentance benefits." It is particularly highlighted in this context that there is a practical impossibility of judicial control when it comes to the provision of benefits to cooperating individuals *de lege lata*.¹⁷

5. CONCLUSION

The purpose of this commentary was not only the analysis of the Court's decision in the case of Erik Adamčo v. Slovakia (Application no. 19990/20) but, above all, an examination of the impacts of this decision on legal practice in the conditions of the Slovak Republic. It is necessary to realise that the issue of cooperating persons in criminal proceedings is a controversial topic with many problematic questions, as evidenced in several cases decided by the Court. The case of Erik Adamčo was not the first in which it was stated that the application of this tool (and thus not the tool itself) causes interference with the fairness of criminal proceedings as a whole. Already in 2019, after the Court's decision in the case of Branislav Adamčo v. Slovakia (Application no. 45084/14), the General Prosecutor's Office stated that legislative intervention was

¹⁵ Proposal of the law amending and supplementing Act No. 300/2005 Coll. Criminal Code as amended by later regulations, and amending and supplementing certain laws. Available at <https://rokovania.gov.sk/RVL/Material/29089/1> (accessed on 07.12.2023).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

necessary. However, such intervention did not come, and the manner of using the testimonies of so-called "penitents" continued to raise questions in the conditions of the Slovak Republic, not only among the general public but also in the professional community.

It is necessary to mention that the starting points outlined by the Court in the decision under discussion were embraced to some extent by the proposer in the explanatory memorandum concerning the above-presented principles of the amendment to the Criminal Procedure Code. Specifically, the need to assess and weigh the benefits provided in relation to evaluating the testimony of cooperating individuals is noteworthy. Similarly, the proposed incorporation of a judicial element in relation to the termination and conditional termination of the criminal prosecution of such persons. The proposer himself presents this proposal as a platform through which it is possible to ensure compliance with and respect for the constitutional principle of conducting criminal proceedings only in a lawful manner. In addition to the principles of criminal proceedings, it is essential to oversee the safeguarding of the basic rights and freedoms of the accused and the individuality of each accused person (Kurilovská and Krásná, 2023, p. 303). On the other hand, in connection with the presented amendment, many practical questions arise, especially whether the necessity of keeping and disclosing records of a cooperating person (in relation to granted benefits, no later than in the stage before the court) will not result in the practical non-application of the institute in question. This consideration takes into account concerns that further criminal proceedings, in which the person acts as a cooperating individual (and, for example, has not yet been charged in such criminal proceedings), might be jeopardised.

While the actual impact of the decision in the case of Erik Adamčo v. Slovakia (aside from the financial aspect) is the "mere" need to rectify the existing situation (thus removing the interference with the legality of the criminal proceedings as a whole), one consequence is the possibility of reopening the proceedings (retrial), which the Court considers, under the circumstances, as the most suitable form of remedy. From the perspective of the General Prosecutor's Office, this is perceived as a legal benefit. However, it is essential to realise that it is the result of the incorrect application of a legal norm. A basic generalisation of the principles stated by the Court in these matters would have sufficed, practically applying approaches created at the supranational level. The legislator's vision rests precisely on these principles, and only time will tell if it will be realised not only in a proclaimed manner.

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